No. 4636

10

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

GEORGE J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.

Parker Printing Company, 523 Clay Street, San Francisco.

No. 4636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from an order of the District Court of the Northern District of California dismissing a petition for habeas corpus. The proceeding was there brought to test the validity of the previous order of the Department of Labor directing the deportation of appellant under the

provisions of Section 19 of the Act of February 5, 1917 (39 Stat. 889).

The petition filed on behalf of appellant on May 23, 1925, was demurred to by respondent. On June 16, 1924, the demurrer was sustained and the application for a writ denied, and the petition dismissed.

The petition as amended, according to its terms, sets up and makes as a part thereof as Exhibit "A" the usual immigration record of the case. This record has been sent to the Clerk of this Court.

The detained arrived at the port of San Francisco October 18, 1921, and was admitted as the wife of a native born citizen (Ex. A, p. 4).

On August 19, 1924, a Miss Cameron gave a statement as to the detained being found in the raid of certain premises at 34 Beckett Avenue (Ex. A, p. 5).

Thereupon on September 3, 1924, a warrant of the Assistant Secretary of Labor was issued for her arrest under the provisions of the Immigration Act for the reason "that she has been found practicing prostitution after her entry" (Ex. A, pp. 1-3).

The application for the warrant of arrest was made by the Acting Commissioner of Immigration at the port of San Francisco, accompanied by the verification of landing of the detained, the statement of Miss Cameron; also statements of detained taken August 19, 20, and 21, 1924 (Ex. A, p.11).

On September 16, 1924, the matter was called for hearing before an Immigration Inspector, the detained being present with counsel (Ex. A, p. 58). Thereupon at the request of counsel the matter was continued to a later date; on November 24, 1924, the detained being present, accompanied by her counsel, the matter was heard before an examining inspector. The sworn statement of the detained was taken; also the testimony of Rose Wong, Lily Lum, Lung Ah Sung and Lily Chan. There was also submitted the testimony of Lee Ah Cheong, the husband of the detained, and of Lung Sung Yow. Thereupon at the request of counsel for the detained, the matter was postponed for a few days for further hearing in order to "make an investigation".

On December 9, 1924, further testimony was given on rebuttal by the detained, at the close of which her counsel made a statement appearing at page 25 of Exhibit "A". He said "I would like to make a statement *for* the *record* to *lay a foundation* for the *premises* for *an investigation* on the *part* of the *immigration authorities* to have a subpoena issued on behalf of the defense in this case". It was further said that counsel after the conclusion of the last hearing had gone to 719 Sacramento Street, one of the places mentioned in the testimony, and there found one Lee Yick, the manager, and that he was told by Lee Yick that he had never met the

defendant at the place; that Lee Yick refused to accede to counsel's request that he attend and give testimony and that his testimony and the testimony of other members of the store is vital. Further when asked by the inspector if the case was closed, counsel responded, "Yes, with the exception of our request just made by Mr. Stidger" (Ex. A, p. 24).

On the same day examining Inspector Benson took the statements of Police Officers Manion and Floyd, also the statement of Lee Lim at 719 Sacramento Street. In the statement of Lee Lim he said that he was manager of the store there and that while he knew Lee Yick, Lee Yick was not manager, nor had he any interest in the store (Ex. A, p. 31).

On December 12, 1924, Inspector Benson reported to the Commissioner that in response to request of counsel for the detained he went to 719 Sacramento Street and found Lee Lim who stated he was the manager of the firm since 1920, and that, while he knew Lee Yick, he was not connected with the firm in any manner. The Inspector also obtained the partnership list filed at the Island, and that the name of Lee Yick does not appear on the same. The inspector further took the statements of two police officers and suggested that a date be set for a further hearing in order that the statements might be made a part of the record, as well as the statement of Lee Lim and the partner-

ship list, adding that if the attorneys for detained so desired, Police Officers Manion and Floyd would be produced for cross-examination (Ex. A, pp. 19, 18).

The matter came on for further hearing before the Inspector, December 30, 1924 (Ex. A, pp. 23, et seq.). The statements of the two police officers were introduced, also the statement of Lee Lim; these without objection. Thereupon the two police officers were examined and cross-examined by counsel. At the close of this examination the inspector asked counsel for the alien *"is your case now closed?"* The response was *"yes"*. Counsel made no further request, and the matter being submitted, the inspector stated that the charge contained in the warrant had been sustained and recommended deportation.

Upon a review of the testimony and proceedings, the Secretary of Labor concurred in the recommendation and ordered the deportation.

As grounds for the petition for the writ it is alleged that the hearing before the Department of Labor was unfair in three respects:

(a) That there were deficiencies in the original showing to obtain the warrant in that it was based upon the statement of one Donaldina Cameron which was not verified.

(b) That the evidence contained in the exhibit "was of such a conclusive kind and character" as

to establish the fact that the detained was not guilty as charged, and that it was an abuse of discretion on the part of the Secretary to make the order and refuse to be guided by the evidence.

(c) That the Department refused to subpoena certain witnesses on behalf of the detained, and Section 16 of the Immigration Act, and subdivisions (a) and (b) of Rule 23 of the Rules of February 1, 1924 are cited at length as not having been complied with; it is further said that the detained did not have an opportunity to cross-examine certain witnesses examined by an inspector.

In the printed brief filed on behalf of the detained three propositions are argued.

I. (a) That the Commissioner of Immigration refused to subpoena certain witnesses after request therefor was made by petitioner.

(b) That appellant was not given an opportunity to cross-examine one witness Lee Lim.

II. That the order of deportation was not based upon sufficient evidence.

III. That the warrant for arrest was unsupported by a proper showing required by the Immigration Rules.

We shall discuss these propositions in order.

ARGUMENT.

I.

THE COMMISSIONER OF IMMIGRATION DID NOT REFUSE TO SUBPOENA ANY WITNESSES REQUESTED BY THE DETAINED; THERE WAS NO REQUEST MADE.

It is said that the hearing before the Department was unfair in that the Commissioner refused to subpoena for the detained a certain witness, to wit, one Lee Yick, and the provisions of Section 16 of the Immigration Act of 1917 and of Rule 23 promulgated by the Secretary under that Act are invoked (Brief of Appellant, p. 8). A portion of the rule is printed by counsel, but it is apparent that he has overlooked a material portion thereof. Rule 23, effective February 1, 1924, and at the time of the hearing, and which is also the present rule, is as follows (italics ours):

> "Rule 23.—Subpoenaing Witnesses.
>
> Subdivision A.—When power exercised.
>
> Paragraph 1.—The provision of section 16, act of February, 1917, authorizing commissioners of immigration and inspectors in charge to subpoena witnesses and require the production of books, papers, and documents is intended to aid, not to impede, the immigration officers in the performance of their duties. The power to issue subpoenas will be exercised, therefore, only when absolutely necessary. Whenever an inspector conducting an investigation or a board of special inquiry holding a hearing is of opinion that a certain witness whose testimony is deemed essential to a proper decision of the case will not appear and testify or produce books, papers, and docu-

ments unless commanded to do so, such inspector or the chairman of such board shall request the commissioner or inspector in charge to issue a subpoena and have it served upon such witness. *If an alien or his authorized representative requests that a* witness be subpoenaed, he shall be required, as *conditions precedent* to the granting of the request *to state in writing what he expects* to *prove* by such *witness* or the books, papers, and documents indicated by him and to show affirmatively that the proposed evidence is *relevant* and *material* and that he has made diligent efforts without success to produce the same. The examination of the witness or of the books, papers, and documents produced by him shall be limited to the purpose specified in the written assignment of the alien or his authorized representative. But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

These rules are promulgated by the Secretary under the authority of law and thus have the force of law. The rule is reasonable, in fact the very rule is invoked by counsel as the foundation of applicant's claim. Testing the case by this rule, it is seen that there was no compliance whatever, that no request in writing was made for a subpoena; indeed the facts show that there was no regular request whatever. It will be observed that counsel did not request the subpoena, even verbally, he merely asked to "lay a foundation for the premises

for an investigation'' on the part of immigration authorities to have the subpoena issued. The immigration authorities did so investigate forthwith, and, according to the report, found that the alleged witness was not truthfully stating that he was the manager of the store in question. The inspector having so reported, counsel made no further reference to the matter. Indeed, at the close of the examination, when the inspector asked if that was the end of his case, counsel responded ''yes''. There was no suggestion of any further proceeding, or of the necessity for taking any further testimony. Neither was there any request for the cross-examination of Lee Lim, or of any other absent witness, nor was there any request for any subpoena to issue to bring in any witness. At that time counsel had seen the report of the examiner to the effect that Lee Yick could not truthfully testify as claimed. He may well have concluded that since the production of a witness who would testify falsely would prejudice his whole case, that it was the part of prudence not to pursue the matter further. Thus the record is clear that the rule invoked was in no respects complied with; that there was not even a categorical verbal request for the subpoena, there was merely the suggestion of a preliminary investigation, this being had and the adverse result reported, counsel did not further pursue the matter, but affirmatively stated that his case was closed.

As to the further point made that there was no opportunity to cross-examine Lee Lim, it is sufficient to answer that according to the record no such request was ever made. The statement of Lee Lim was clear and it may well be assumed that counsel, having read it, became satisfied that cross-examination could not have had any result favorable to himself.

The recent opinion of this court in the case of

Yip Wah v. Nagle, Number 4551,

discusses to some extent the failure to produce a witness for cross-examination. It was held in that case that the situation did not render the hearing unfair. There the statements were received in evidence over objection; here the evidence of Lee Lim was received without objection. Then there was a request for cross-examination; here there was no request. There the Department was said to have satisfactorily shown an inability to produce; here counsel did not even request production.

It is quite clear that there was nothing in this assignment that should be taken to render the hearing unfair; that so far from the Department violating one of its own rules the situation is that the applicant did not comply with the rule or properly, or even in any manner, request the subpoena.

II.

THE EVIDENCE WAS NOT INSUFFICIENT TO JUSTIFY THE ORDER OF DEPORTATION.

It is a familiar rule that neither this court nor the District Court has the function of weighing the evidence taken before the Department of Labor in this class of cases. They may only consider whether there was any evidence to sustain the conclusion of the secretary.

Testing the proceedings by this rule and by the authority cited by appellant, it is quite clear that it was proven at the deportation hearing that the applicant had since her entry into the United States been found practicing prostitution. The testimony of the four witnesses, Rose Wong, Lily Lum, Lung Ah Sung, and Lily Chan (Ex. A, pp. 53-39), has amply such tendency and effect.

This court has recently said in a similar case, the case of

Wong Shee v. Nagle, Number 4541:

> "It is unnecessary to set forth the testimony tending to show that the petitioner, Wong Shee, alias Chew Wah, practiced prostitution, and was an inmate of a house of prostitution after her arrival in the United States. It was direct and positive as to time, place and circumstances. The character of the witnesses, and whether they told the truth, were matters for the consideration of the immigration authorities and we cannot disturb their conclusions."

Here the testimony was given by certain Chinese women who were formerly associates of the detained and knew her mode of living. They subsequently entered a rescue mission and at the time of testifying had reformed. This latter circumstance may have been properly considered by the Commissioner in appraising the weight of the testimony.

We may say also in passing that there is nothing in the record in the instant case that would justify any adverse comment upon the activities of Miss Cameron in charge of the rescue mission. Nor is there any warrant for the statement that the inmates of this mission testifying "were evidently kept in this country for professional witnesses in this class of cases". Their statements appealed to the Secretary as being true and were sufficient in substance and tendency to establish the case against the detained.

III.

THAT THE ORDER FOR THE WARRANT OF ARREST MAY HAVE LACKED PROPER SUPPORT UNDER THE RULES DOES NOT PREVENT THE SUBSEQUENT HEARING FROM BEING SUFFICIENT AND VALID.

It is contended that in applying for the initial warrant of arrest there was not a sufficient showing made under the rules. But it does not appear that there was any objection made at the time as to the sufficiency of the showing to obtain the arrest.

Thereafter the detained employed counsel and participated in the hearing without question. In any event since there was a fair hearing, any insufficiency as to the showing for the original warrant would not have the effect of invalidating the result of the final hearing.

It is well settled that irregularities in the order or arrest do not affect the status of an alien had on a warrant of deportation after a fair hearing.

U. S. v. Uhl, 211 Fed. 628;
U. S. v. Williams, 200 Fed. 538;
Healy v. Backus, 221 Fed. 358;
Siniscalchi v. Thomas, 195 Fed. 701;
Toy Tong v. U. S., 146 Fed. 343;
Wong Shee v. Nagle, Number 4541.

CONCLUSION.

In conclusion it is submitted that the applicant was properly found guilty of the charges stated in the warrant of arrest, and that a warrant for her deportation properly followed; that there was nothing unfair in the hearing, and that the order was supported by sufficient evidence, and the District Court properly dismissed the petition for a writ of habeas corpus.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.